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No. 03-1253

Supreme Court, U.S.
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In The

Supreme Court of the United States

CONSTANCE MACKAY and ELISSA ORCUTT,

Petitioners,

v.

STATE OF MONTANA, BOARD OF REGENTS, and MONTANA UNIVERSITY SYSTEM,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Montana

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTION PRESENTED

Does the Montana Supreme Court's decision rest on adequate and independent state grounds which foreclose this Court's jurisdiction over this appeal?

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MONTANA STATUTES

The relevant portions of the Montana Public Employees Collective Bargaining Act, §§ 39-31-101 to 409, Mont. Code Ann., are as follows:

> **39-31-201. Public employees protected in right of self-organization**
>
> Public employees shall have and shall be protected in the exercise of the right of self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing on questions of wages, hours, fringe benefits, and other conditions of employment, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection free from interference, restraint, or coercion.
>
> **39-31-305. Duty to bargain collectively – good faith**
>
> (1) The public employer and the exclusive representative, through appropriate officials or their representatives, shall have the authority and the duty to bargain collectively. This dut extends to the obligation to bargain collectively in good faith as set forth in subsection (2) of this section.
>
> (2) For the purpose of this chapter, to bargain collectively is the performance of the mutual obligation of the public employer or his designated representatives and the representatives of the exclusive representative to meet at reasonable times and negotiate in good faith with respect to wages, hours, fringe benefits, and other conditions of employment or the negotiation of an agreement or any question arising thereunder

and the execution of a written contract incorporating any agreement reached. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

(3) For purposes of state government only, the requirement of negotiating in good faith may be met by the submission of a negotiated settlement to the legislature in the executive budget or by bill or joint resolution. The failure to reach a negotiated settlement for submission is not, by itself, prima facie evidence of a failure to negotiate in good faith.

39-31-306. Collective bargaining agreements

(1) An agreement reached by the public employer and the exclusive representative must be reduced to writing and must be executed by both parties.

(2) Except as provided in subsection (5), an agreement may contain a grievance procedure culminating in final and binding arbitration of unresolved grievances and disputed interpretations of agreements.

(3) An agreement between the public employer and a labor organization must be valid and enforced under its terms when entered into in accordance with the provisions of this chapter and signed by the chief executive officer of the state or political subdivision or commissioner of higher education or by a representative. A publication of the agreement is not required to make it effective.

(4) The procedure for the making of an agreement between the state or political subdivision and a labor organization provided by this chapter

is the exclusive method of making a valid agreement for public employees represented by a labor organization.

(5) An agreement to which a school is a party must contain a grievance procedure culminating in final and binding arbitration of unresolved and disputed interpretations of agreements. The aggrieved party may have the grievance or disputed interpretation of the agreement resolved either by final and binding arbitration or by any other available legal method and forum, but not by both. After a grievance has been submitted to arbitration, the grievant and the exclusive representative waive any right to pursue against the school an action or complaint that seeks the same remedy. If a grievant or the exclusive representative files a complaint or other action against the school, arbitration seeking the same remedy may not be filed or pursued under this section.

COUNTER STATEMENT OF THE CASE

Petitioners Constance MacKay and Elissa Orcutt have invited this Court to review and overturn the Montana Supreme Court's decision in *MacKay v. State of Montana, Board of Regents, and Montana University System*, 317 Mont. 467, 79 P.3d 236 (2003), asserting the decision "flatly contradicts" several of this Court's decisions. *See Petition for Writ of Certiorari* at p. 2. Even a cursory review of the Montana Supreme Court's decision reveals it was predicated upon adequate and independent state grounds which necessarily precludes this Court from exercising jurisdiction over the present appeal.

The underlying decision sets forth the Montana Supreme Court's interpretation of Montana's statutory and decisional law regard.ng state employee collective bargaining agreements and grievance procedures. The opinion does not, despite Petitioners' argument to the contrary, reflect any "confusion" regarding the relationship between state law and federal labor law. *See Petition* at p. 2. The relationship between federal labor law and Montana law was not at issue. The opinion addressed the relationship between Montana's labor policy, as expressed through judicial interpretations of a collective bargaining agreement covering state employees, and remedies provided by other Montana statutes.

A. Underlying Litigation

Petitioners Constance MacKay and Elissa Orcutt are former nursing instructors at the Montana State University College of Technology in Great Falls, Montana ("COT"). As COT employees, Petitioners were covered by the collective bargaining agreement ("CBA") between the Montana Board of Regents and COT as the employer and the Vocational-Technical Educators of Montana, MFT, AFT, AFL-CIO. *See MacKay v. State of Mont.*, 317 Mont. at 468-469, 79 P.3d at 237.

In April 2000, Petitioners filed suit against the State of Montana, the Board of Regents, and the Montana University System, asserting the following claims for relief:

(1) That COT had negligently failed to provide them a safe working environment;

(2) Common law constructive discharge;

(3) Statutory constructive discharge; and

(4) Breach of the covenant of good faith and fair dealing.

COT ultimately moved for summary judgment, pursuant to Rule 56, Montana Rules of Civil Procedure, based upon, *inter alia*, Petitioners' failure to utilize the grievance procedure required by the CBA. The district court denied COT's summary judgment motion in an unwritten decision. On appeal, the Montana Supreme Court reversed the district court's decision, finding Petitioners' claims were covered by the CBA and holding the CBA's grievance procedure was mandatory, thereby foreclosing Petitioners' suit against COT. *MacKay v. State of Mont.*, 317 Mont. at 474, 79 P.3d at 241.

The Montana Supreme Court's opinion was predicated solely upon Montana's statutory and decisional law addressing collective bargaining agreements and grievance procedures applicable to state employees. Any purported "conflict" between Montana law and federal labor law is an illusory one, raised by Petitioners in an effort to secure judicial review of the merits of the Montana Supreme Court's decision.

B. Montana Supreme Court's Decision

The Montana Supreme Court initially determined the terms and conditions of Petitioners' employment with COT were governed by the CBA. *MacKay v. State of Mont.*, 317 Mont. at 472, 79 P.3d at 239. The Court concluded all of Petitioners' claims related to safety issues regarding Petitioners' employment and, as a result, the claims were covered by, and could have been the subject of, a grievance under the CBA. *Id.*

In so holding, the Court relied upon Article 4, 4.1, of the CBA, which provides that the employer shall provide employees with "a place of employment which does not endanger the health and safety of an employee." *Id.*

The Court then concluded the CBA's grievance procedure was mandatory, citing the following CBA provisions:

> 8.1 *GRIEVANCE PROCEDURE*
>
> The purpose of this article is to set forth prompt and efficient procedures *for the resolution of all grievances*. . . .
>
> 8.2 *GRIEVANCE DEFINITIONS*
>
> A grievance shall mean an alleged violation, misinterpretation or misapplication of the provisions of this agreement. . . .
>
> * * *
>
> 8.8 *PROCEDURES FOR FILING GRIEVANCES*
>
> *All grievances must be filed* within twenty-five (25) days after the occurrence of the incident which initiated the grievance, or within twenty-five (25) days after the employee should have reasonably known of the circumstances which gave rise to the grievance. . . . *All grievances* shall be presented in accordance with the grievance procedure set forth below.
>
> *Step 1:* Any employee may file a formal written grievance with the Dean who shall conduct a meeting. . . .
>
> *Step 2:* If the grievance is not resolved at Step 1, the grievance may be filed with the President. . . .

> "All," i.e. every, grievance must be filed within 25 days. All grievances must be presented in accordance with the agreed procedures.

MacKay v. State of Mont., 317 Mont. at 472-473, 79 P.3d at 239-240 (emphasis in original).

The Court rejected Petitioners' argument that the CBA provided a permissive grievance procedure because it lacked a clear and unmistakable waiver of the right to a jury trial. *Id.* at 473, 79 P.3d at 240. The Court declined to depart from Montana's longstanding rule requiring exhaustion of remedies required by a collective bargaining agreement. *Id.* at 474, 79 P.3d at 241. "Therefore, if the CBA covers the dispute, as is the case here, the CBA should be interpreted as requiring use of the grievance procedure." *Id.* at 473, 79 P.3d at 240.

> Only in those cases where it is certain that the arbitration clause contained in a collective bargaining agreement is not susceptible to an interpretation that covers the dispute is an employee entitled to sidestep the provisions of the collective bargaining agreement.

Id., *citing*, *Small v. McRae*, 200 Mont. 497, 504, 651 P.2d 982, 986 (1982); *Winchester v. Mountain Line*, 294 Mont. 517, 982 P.2d 1024 (1999).

REASONS FOR DENYING THE WRIT

I. The Montana Supreme Court's Decision Rests Upon Adequate and Independent State Grounds.

Respect for the independence of state courts, as well as an aversion to rendering advisory opinions, are the

cornerstones of this Court's refusal to review state court decisions that rest upon an adequate and independent state ground. *See Michigan v. Long*, 463 U.S. 1032, 1040 (1983). The Court adopted this practice, in part, to obviate the "unsatisfactory and intrusive practice of requiring state courts to clarify their decision to the satisfaction of this Court." *Arizona v. Evans*, 514 U.S. 1, 7 (1995). The Court also concluded that this approach would "provide state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference, and yet will preserve the integrity of federal law." *Id.*

Accordingly, the Court will not review a question of federal law if the state court's decision rests on a state law ground that is independent of the federal question and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). This rule applies "whether the state law ground is substantive or procedural," and in the case of direct review of a state-court judgment, the independent and adequate state ground doctrine is jurisdictional. *Id.*

It is, of course, "incumbent upon this Court . . . to ascertain for itself . . . whether the asserted nonfederal ground independently and adequately supports the judgment." *Abie State Bank v. Bryan*, 282 U.S. 765, 773 (1931); *see also Coleman v. Thompson*, 501 U.S. at 737 ("In those cases in which it does not fairly appear that the state court rested its decision primarily on federal grounds, it is simply not true that the 'most reasonable explanation' is that the state judgment rested on federal grounds.").

Even a cursory review of the Montana Supreme Court's decision reveals that, to the extent it addressed a

question of federal law, the decision was primarily predicated upon adequate and independent state grounds. The decision does not "rest primarily on federal law," nor is it "interwoven with the federal law." On the contrary, the decision, on its face, clearly reflects the Montana Supreme Court's opinion addressed Montana's statutory and decisional law regarding collective bargaining agreements and grievance procedures applicable to state employees.

In asserting the Montana Supreme Court's decision contravenes federal labor law, Petitioners ignore the fact that the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*, does not apply to the labor relations of state and local governments, which are left to the individual states. *See* 29 U.S.C. § 152(2) ("When used in this subchapter . . . the term 'employer' . . . shall not include . . . any state or political subdivision thereof."); *see also Abood v. Detroit Board of Ed.*, 431 U.S. 209, 223 (1977) ("The National Labor Relations Act leaves regulation of the labor relations of state and local governments to the states."). Accordingly, the NLRA exempts state government employers and any "political subdivision" from its coverage, leaving such employers to be governed by state labor laws. *See Moir v. Greater Cleveland Regional Transit Auth.*, 895 F.2d 266, 271 n.8 (6th Cir. 1990) (*citing Crilly v. Southeastern Penn. Trans. Auth.*, 529 F.2d 1355 (3rd Cir. 1976)).

Montana has chosen to establish a regulatory scheme for local government bargaining units which, although not identical in every respect to the NLRA, is broadly modeled after federal law. Under Montana law, public sector employees enjoy rights parallel to those protected under federal legislation – the right to organize and join a labor organization, and to bargain collectively through representatives of their own choosing on matters relating to wages

and other conditions of employment. *See* Mont. Code Ann. § 39-31-201. Montana's official state policy relating to collective bargaining agreements is codified at Mont. Code Ann. § 39-31-101, which provides:

> In order to promote public business by removing certain recognized sources of strife and unrest, it is the policy of the state of Montana to encourage the practice and procedure of collective bargaining to arrive at friendly adjustment of all disputes between public employers and their employees.

The Montana Public Employees Collective Bargaining Act, Mont. Code Ann. §§ 39-31-101 to 409, imposes the following duty to bargain collectively upon public sector employers and employees:

> **39-31-305. Duty to bargain collectively – good faith**
>
> (1) The public employer and the exclusive representative, through appropriate officials or their representatives, shall have the authority and the duty to bargain collectively. This duty extends to the obligation to bargain collectively in good faith as set forth in subsection (2) of this section.
>
> (2) For the purpose of this chapter, to bargain collectively is the performance of the mutual obligation of the public employer or his designated representatives and the representatives of the exclusive representative to meet at reasonable times and negotiate in good faith with respect to wages, hours, fringe benefits, and other conditions of employment or the negotiation of an agreement or any question arising thereunder and the execution of a written contract incorporating any agreement reached. Such obligation

> does not compel either party to agree to a proposal or require the making of a concession.
>
> (3) For purposes of state government only, the requirement of negotiating in good faith may be met by the submission of a negotiated settlement to the legislature in the executive budget or by bill or joint resolution. The failure to reach a negotiated settlement for submission is not, by itself, prima facie evidence of a failure to negotiate in good faith.

The Montana Public Employees Collective Bargaining Act also provides that collective bargaining agreements may include a grievance procedure culminating in final and binding arbitration:

> (2) Except as provided in subsection (5), an agreement may contain a grievance procedure culminating in final and binding arbitration of unresolved grievances and disputed interpretations of agreements.
>
> (3) An agreement between the public employer and a labor organization must be valid and enforced under its terms when entered into in accordance with the provisions of this chapter and signed by the chief executive officer of the state or political subdivision or commissioner of higher education or by a representative. A publication of the agreement is not required to make it effective.

Mont. Code Ann. § 39-31-306.

In the case *sub judice*, Article 2, 2.1, b. of the CBA provided that the bargaining unit consisted of all instructional employees of COT employed for the full academic year. That encompassed the Petitioners. *See MacKay v.*

State of Mont., 317 Mont. at 471, 79 P.3d at 239. Article 5, 5.11, A., of the CBA provided that employees covered by the terms of the agreement shall pay either union dues or a representation fee. *Id.* Petitioners paid the representation fee and, as a result, were subject to the collective bargaining agreement generated after the public employer and the exclusive representative of the union satisfied their legal duties to bargain collectively and in good faith. *Id.* at 471-472, 79 P.3d at 239. *See also* Mont. Code Ann. § 39-31-305.

While the Montana Supreme Court has looked to the construction placed upon the NLRA by the federal courts as an aid to interpreting the Montana Public Employees Collective Bargaining Act, the Montana Court has done so only as an interpretive tool. *See, e.g., Small v. McRae*, 200 Mont. at 502, 651 P.2d at 985 (*citing State ex rel. Department of Highways v. Public Employees Craft Council*, 165 Mont. 349, 529 P.2d 785 (1974)).

The underlying action rested upon a collective bargaining agreement that was governed by a Montana statute, and the rights Petitioners sought to enforce were likewise governed by Montana's statutory and common law. The issues raised in the underlying action, and the sole basis for the Montana Supreme Court's decision, involved purely state law. As a result, the Montana Supreme Court's decision was not, nor should it have been, controlled by this Court's decisions cited in the petition. Accordingly, Petitioners' argument that the Montana Supreme Court's decision "flatly contradicts" several of this Court's decisions, *i.e.*, *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998) and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), is without merit. Those

decisions are not controlling over this state law controversy.

In *Wright* and *Alexander*, this Court addressed the rights of employees under federal statutes. *See Wright*, 525 U.S. at 72 (determining whether a collective bargaining agreement may waive access to a court to resolve a claim under the Americans with Disabilities Act, absent an express statement of such waiver); *Alexander*, 415 U.S. at 38 (determining whether a collective bargaining agreement may waive access to a court to resolve a claim under Title VII of the Civil Rights Act). Further, in each of those cases, the collective bargaining agreement was entered into pursuant to the Labor Management Relations Act. *Cipolla v. Rhode Island College, Board of Governors for Higher Educ.*, 742 A.2d 277, 282 (R.I. 1999) (citations omitted).

Wright and *Alexander* addressed important federal anti-discrimination statutes and this Court, in each case, noted there were overwhelming public policy reasons for preserving access to the judicial forum for consideration of civil rights claims. *Cipolla*, 742 A.2d at 282 (*citing Alexander*, 415 U.S. at 47-49). The same concerns are simply not present in this case.

Wright and *Alexander* addressed how to accommodate federal labor policy, as expressed through the federal collective bargaining statute for private sector employees, *i.e.*, the NLRA/LMRA, with the remedies provided by federal discrimination statutes. In *MacKay v. State of Mont.*, the Court focused squarely upon how to accommodate Montana's labor policy, as expressed through a state collective bargaining act for state employees, with the remedies provided in other Montana statutes and common

law. This is clearly an issue purely of state law, and the Montana Supreme Court's decision was not, nor should it have been, controlled by the decisions of this Court set forth in the petition.

That conclusion is all the more apparent in light of Montana's strong public policy favoring arbitration. As the Montana Supreme Court explained:

> This Court has consistently held that an employee covered by a CBA that contains a grievance procedure must exhaust that remedy before bringing suit. *Small,* 200 Mont. at 504-05, 651 P.2d at 986-87; *Brinkman*, 224 Mont. at 243-45, 729 P.2d at 1305-06; *Irving v. School Dist. No. 1-1A* (1991), 248 Mont. 460, 469, 813 P.2d 417, 422; *Lueck v. United Parcel Serv.* (1993), 258 Mont. 2, 8, 851 P.2d 1041, 1044-45. The purpose of the rule is to encourage arbitration of disputes, and to make the use of grievance procedures in union agreements attractive to both labor and management.
>
> > To allow a member of the collective bargaining unit to completely sidestep available procedures would, just as under federal law, exert a disruptive influence upon both the negotiation and administration of collective bargaining agreements and effectively deprive employers and unions of the ability to establish a uniform and exclusive method for the orderly settlement of employee grievances.

MacKay v. State, 317 Mont. at 473-474, 79 P.3d at 240-241.

Petitioners' underlying lawsuit arose under Montana law and was governed by Montana's statutory and common law. As a result, the Montana Supreme Court is the final arbiter as to the Montana law governing the suit. Granting the petition for certiorari in this matter would necessarily impinge upon the well-settled rule first enunciated in *Erie Railroad v. Tompkins*, 304 U.S. 64, 78 (1938), wherein the Court stated:

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest Court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

The Montana Supreme Court, relying solely upon the decisional and statutory law of the State of Montana, concluded Petitioners were foreclosed from maintaining suit against COT based upon their failure to avail themselves of the remedy required by the CBA. *MacKay v. State of Mont.*, 317 Mont. at 474, 79 P.3d at 241. The Montana Supreme Court's decision rests on adequate and independent state grounds, which necessarily precludes this Court from exercising jurisdiction over the present appeal. *See Michigan v. Long*, 463 U.S. at 1040. Accordingly, this Court should decline to exercise jurisdiction over the present matter.

CONCLUSION

The petition for writ of certiorari should be denied. The Montana Supreme Court properly applied Montana law to state employees under a collective bargaining agreement. The Court's decision rests upon adequate and independent state grounds, and did not address federal labor law, nor was it "interwoven with the federal law." The Montana Supreme Court's decision addressed issues properly left to the states, and this Court should decline to exercise jurisdiction over the present appeal.

Respectfully submitted,

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